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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALVY T. McQUEEN,
Petitioner

v.

COMPTROLLER OF PUBLIC ACCOUNTS,
Respondent

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v.

UNITED STATES OF AMERICA and
COMPTROLLER OF PUBLIC ACCOUNTS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. Introduction

The United States and the Comptroller devote the bulk of their Briefs to side issues—in reality diversions—in the form of alternative statements of the case and arguments that the court of appeals did not accept

and that are not valid in the posture of these cases. Particularly in *McQueen II* (the grand jury case), they devote little attention to the issue decided by the court of appeals and presented in the petition.

We cannot fully respond to these side issues because of space limitations and, in any event, full briefing on the merits is not appropriate in the briefs on the petition. We shall set forth why these side issues are irrelevant and spurious in this case. We shall also note by way of footnote certain instances in which the United States and the Comptroller exceeded the brounds of fair presentation in their Briefs in Opposition. Finally, we ask the Court to remember that these side issues were not accepted by the court of appeals for a reason; the reason is that they lack merit when fully and fairly considered in the context of these cases.

2. The Grand Jury Case—McQueen II

a. Statement

The United States is wrong to represent to this Court (Br. p. 2) that Petitioner was not a target of the grand jury at the time the search warrant was issued and the documents seized. That is a mixed factual and legal issue that is controverted, is not established in the record below or in law, and can only be established after appropriate trial level development.[1]

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1. The United States' alleged record evidence (See Br. 2, at fn.2) for this notion is the United States' Motion to Dismiss and Memorandum in Support, neither of which contain any evidence by affidavit or otherwise. The real genesis for this controverted view of the facts came in the form of an *ex parte* letter from the Assistant United States Attorney in charge of the grand jury investigation ("AUSA") who authorized the IRS agents assisting her in the grand jury investigation to make the disclosures in question to the Comptroller and to

The United States is also wrong in representing (Br. 3) that Petitioner's allegation that the documents in question were grand jury matters is based *only* upon the fact that Mr. Hughes, an IRS agent assigned to assist the grand jury, made the disclosures. Even if that were true (it is not true and the record shows it is not true),[2] it is irrelevant to the issue of whether Petitioner stated a claim upon which relief can be granted.

b. Argument

The United States wastes most of its argument (Br. 4-6) asserting a proposition not in issue here—the proposition that Rule 6(e), Federal Rules of Criminal Pro-

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the IRS for civil tax purposes. In the *ex parte* letter to the district court, the AUSA sought to excuse her authorization of the disclosures, the very conduct in issue in this case, by making self-serving, controverted, unsworn and untested allegations as to the relationship of the grand jury investigation to the disclosures in question and further sought to poison the district court's attitude toward the Petitioner by making allegations of criminal misconduct which have never even resulted in a criminal indictment much less been proven. The district court below claims not to have read the letter or considered it in dismissing the case, and the court of appeals correctly did not consider the letter as being pertinent to the issue of whether the dismissal was proper. That the United States would allow the AUSA to attempt to manipulate justice through the *ex parte* letter is itself outrageous. That the United States would now before this Court resurrect as the unmitigated truth the unproven and controversial allegations made in that *ex parte* letter is even more outrageous.

2. The limited record developed below shows that the allegation is also based upon (1) a meeting, immediately after the seizure, between counsel for Petitioner and Ms. Wong, Mr. Hughes' direct supervisor (both of whom were working for the AUSA to assist the grand jury), during which Petitioner was identified as a target of the grand jury investigation to the disclosures in question and further sought investigation and (2) various telephone conferences between the AUSA and counsel for Petitioner immediately after the seizure. See Counsel's Affidavit, par. 7, pp. 2-3, and par. 10, p. 4 (including attached contemporaneous letters); see also Internal Revenue Manual,

cedure,[3] does not create a private right of action against the United States. Petitioner agrees. (See Pet. 12-13).

We turn therefore to the only issue presented by the court of appeals opinion and the petition in *McQueen II* —i.e., whether a district court in the exercise of its supervisory powers can issue appropriate remedial orders against third parties (including both the United States and the Comptroller) illegally in possession of grand jury information. The United States argues as a centerpiece of its opposition (Br. 5) that the language of Rule 6(e)(2) denies the supervising district court the power to issue orders affecting third persons in possession of grand jury matters.

The language of Rule 6(e)(2) now relied upon by the United States has the limited purpose of insuring that grand jury witnesses are not subject to the obligation of secrecy. See Notes of Advisory Committee on Rules, Note to Subdivision (e), par. 2. That language was not meant to emasculate the district courts' power to control the use and dissemination of secret grand jury information, and the United States cites neither authority nor logic for that reading of Rule 6(e)(2). Indeed the argument is so absurd[4] that the United States' need to make

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par. 9267.32(2) (prohibiting IRS agents assigned to assist a grand jury from participating in IRS investigations of the subject matter or target of the grand jury investigation); and *In re Grand Jury Subpoena*, 920 F.2d 235, 243 (4th Cir. 1990) (cautioning in a strikingly similar case that "the procedures such as those utilized in this case might, under *slightly* varying circumstances, jeopardize an entire investigation." (Emphasis supplied)).

3. All Rules references are to the Federal Rules of Criminal Procedure except as specifically noted.

4. The absurdities are exemplified by the following: If a Court allowed disclosure to the Justice Department by order properly granted under Rule 6(e)(3)(C)(i) for use in an antitrust proceeding, the United States' interpretation of Rule 6(e)(2) is that the Justice

it a centerpiece of its argument affirms the weakness of the United States' position, as does the fact that the United States itself asserts the contrary when the United States finds it in its interest to have a court order the return of grand jury information in the hands of persons not directly within the scope of Rule 6(e)(2).[5]

The United States and the Comptroller assert alternatively that documents can *never* be grand jury matters prohibited from disclosure. (See U.S. Brief p. 7; and Comptroller's Br. pp. 6-7.) The argument *in the context of this case* is that anyone involved with the grand jury (i.e., the grand jurors, the government attorney (AUSA here), or other persons assisting the grand jury (IRS agents here)) have unilateral authority to disclose documents used in the grand jury investigation however acquired by the grand jury (e.g., by subpoena, search warrant or otherwise) free of the requirement that they first

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Department could then disseminate the information however and to whomever it liked, including for instance to the IRS in clear violation of this Court's holding in *United States v. Sells Engineering, Inc.*, 429 U.S. 418 (1983). The United States' interpretation of Rule 6(e)(2) is also contrary to the consistent holdings of this Court and other courts that the supervising district court has power to include in a Rule 6(e)(3)(C) order limitations upon further dissemination of grand jury information and even order return to the grand jury of the information previously disclosed. E.g., *Sells Engineering, supra*, pp. 422-423, n.6 (court can protect target from "effects of past disclosures"); *State of Illinois v. Sarbaugh*, 552 F.2d 768, 775 n.10 (7th Cir. 1977), *cert. den.*, 434 U.S. 889 (1977) (court can prohibit further disclosure); and *Matter of Special March 1981 Grand Jury*, 735 F.2d 575, 577 (7th Cir. 1985) (court can order return). Certainly if the supervising district court has power to limit use and further disclosure in cases of legally authorized disclosures of grand jury information, the supervising district court has equal power in cases, such as this case, of illegal disclosures.

5. In *United States v. Charles Hayes, Individually and d/b/a Challenger, Ltd.*, (E.D. Ky.—Civ. No. 90-175), cited in the petition, the United States invoked Rule 6(e) to have the court order return

obtain a Rule 6(e)(3)(C) order. The argument, if accepted, would allow a blatant end-run around this Court's holdings in *United States v. Baggott,* 429 U.S. 476 (1983), and *United States v. Sells Engineering, Inc.,* 429 U.S. 418 (1983).

The cases cited by the United States and the Comptroller do not stand for that absurd proposition. Those cases simply suggest that, *in a Rule 6(e)(3)(C) proceeding,* a district court can permit disclosure of documents in appropriate cases. See e.g., *In Re Grand Jury Proceedings,* 851 F.2d 860 (6th Cir. 1988) (rejecting even the proposition that documents are never grand jury matters in the context of a Rule 6(e)(3)(C) proceeding). Indeed, the United States itself asserts the contrary position when it does not desire to disclose documents in a Rule 6 (e)(3)(C) proceeding instituted by a private party. In *Federal Deposit Insurance Corporation v. Ernst & Whinney,* 921 F.2d 83, 87 n.1 (6th Cir. 1990), the Government objected to even preparing a list of documents which identifies the documents as being considered by the grand jury, for such a list (just as the documents themselves) could show the thrust of the grand jury investigation. This conflict among the circuits (and even within the United States' own litigating positions) is not relevant here, for no Rule 6(e)(3)(C) order was obtained in this case. If, however, this Court were to believe that this side issue were somehow involved in this case, it should grant the writ to resolve the conflict among the circuits on this issue.

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of certain computer storage equipment which the United States alleged contained "grand jury material protected by Fed. R. Crim. P. 6(e)." (United States Complaint for Injunctive Relief and Writ of Possession, par. 10.) Needless to say, the United States succeeded in obtaining an order for the return of the alleged "grand jury material."

2. Tax Injunction Act Case—McQueen I

At the threshold, the Comptroller argues (Br. 7-8) that, even if the court of appeals' actual holding raises an important issue for this Court's review, this Court should decline review because the record below fails to establish Petitioner's refund or bonding remedies were not adequate. The easy answer is that, even if *arguendo* that were an element of Petitioner's case, the case was dismissed before Petitioner was required to prove the elements of his case.[6] More importantly, that is not an element of Petitioner's case, for Due Process as interpreted in *Commissioner of Internal Revenue v. Shapiro,* 424 U.S. 614 (1976) requires a prompt post-deprivation hearing after a jeopardy assessment without *any* predicate showing of inadequacy of other remedies.

Turning to the issue actually presented here, the Comptroller's position is a forceful argument that this Court should grant the petition in this case. The Comptroller's Brief establishes that, at the same time the Comptroller was asserting to the court of appeals below that the Petitioner had a general injunctive remedy in the state courts, the Comptroller knew that the Texas legislature had, at the Comptroller's own request, enacted a statute, the Texas Anti-Injunction Statute (Texas Tax Code, § 112.108), which denied to the Petitioner the precise remedy the Comptroller successfully urged to the court of appeals was available to Petitioner.

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6. The only hearing was a hearing on Petitioner's request for preliminary injunction, in which Petitioner is not required to prove his whole case upon penalty of dismissal. The Comptroller raises no issue as to the adequacy of Petitioner's pleadings, and questions only Petitioner's alleged failure of proof.

The Comptroller failed to advise the court of appeals of this dramatic development that would have almost certainly defeated his position in the court of appeals.[7] This Court should accordingly grant the petition either for consideration on the merits or remand to the court of appeals to consider this dramatic development.

Recognizing that the Texas Anti-Injunction Statute destroys the position he successfully urged below, the Comptroller amazingly argues that the Texas Anti-Injunction Statute violates the Texas Constitution's "open courts" guarantee and will not be applied by Texas courts to deny Petitioner a remedy. Texas Constitution, Art. I, § 13 (quoted at p. 14, n.18 of the Comptroller's Brief in Opposition). The argument that the Texas Anti-Injunction Statute is unconstitutional is so fraught with uncertainty[8] that it should not be accepted by this Court without full briefing and argument or without remand to the court of appeals for full consideration.

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7. No clearer breach of the duty of candor can be imagined. See *Board of License Com'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985); and *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 440-441 (1988).

8. Under traditional Tax Injunction Act (28 U.S.C., Section 1341) analysis, the Comptroller would have to convince this Court that there is no reasonable doubt that the Texas courts would find the Texas Anti-Injunction Statute unconstitutional. Even the cases cited by the Comptroller that have addressed the issue of the Texas legislature's power to interpose sovereign immunity to limit tax litigation remedies have not given even the slightest hint that the interposition of sovereign immunity is unconstitutional. *E.g., Hammerman & Gainer, Inc. v. Bullock, supra;* and *Contran Corp. v. Bullock*, 567 S.W.2d 616, 617 (Civ. App.—Austin, 1978, no writ). This Court's decision in *Pennzoil Company v. Texaco Inc.*, 481 U.S. 1 (1987), does not in any way establish, as the Comptroller would have it, that Texas courts would invoke the open courts guarantee to declare the Texas Anti-Injunction Statute unconstitutional.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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